U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 March 2007

Case No. 2005-BLA-5984

In the Matter of:
L.C.[1]
Claimant,

v.

BLEDSOE COAL CORP.
Employer,
and
JAMES RIVER COAL CO., c/o
ACCORDIA EMPLOYER SERVICE,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest.

APPEARANCES:
Phyllis L. Robinson (For Claimant)
Manchester, Kentucky

John H. Baird, Esq. (For Employer/Carrier)
Pikeville, Kentucky

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

[1] Effective August 1, 1006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Further, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (hereinafter referred to as "the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On June 9, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 37).[3] A formal hearing on this matter was conducted on July 25, 2006, in Hazard, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

Procedural History

L.C. ("Claimant") filed an application for benefits under the Act on May 7, 2004. (DX 2). The OCWP made a preliminary determination that Claimant would not be entitled to benefits and scheduled the submission of additional evidence. (DX 24). On March 24, 2005, the District Director issued a Proposed Decision and Order denying benefits. (DX 27). The District Director found that Claimant had worked 24 years in qualifying coal mine employment and that he had pneumoconiosis caused by his past coal mine employment. However, the District Director found that the miner was not totally disabled by pneumoconiosis or any pulmonary disease. Claimant

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I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

requested a formal hearing on this claim and it was transferred to the Office of the Administrative Law Judges on June 9, 2005. (DX 28; DX 37).

ISSUES[4]

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled; and

4. Whether the Miner's disability is due to pneumoconiosis.

(DX 37). Other issues listed on Form CM 1025 at Section 18(B) are constitutional and were raised and preserved for appellate purposes.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant was born on February 3, 1958, and has an eighth-grade education. (DX 2; Tr. 16; DX 16). He married B.C. on April 20, 1978. (DX 11; DX 16; Tr. 15). They remain married, and had one daughter, K.C., who was under twenty-three years of age and a full-time student at the time the claim was filed. I find that Claimant's spouse is a dependent for purposes of benefit augmentation and his daughter is a dependent until the time she was no longer a full-time student or married and no longer dependent on Claimant according to Part 725 of the regulations.[5] Claimant last engaged in coal mine employment for Bledsoe in March of 2003, where he was a beltman, timberman and jack setter. (DX 4; DX 5; DX 16; Tr. 11). In this job, he worked at the face of the coal in dusty conditions, shoveling the belt line, rock dusting, and servicing the belt and headdrives. These jobs required standing ten to twelve hours each day; lifting 200 pounds about five to ten times each day; lifting fifty pounds twenty-thirty times each day; and lifting twenty pounds all day long. (DX 5; DX 16). This work was all underground. (Tr. 10). He began mining when he was about twenty-one or twenty-two and quit mining in March of 2003 when he injured his back. (DX 2; DX 4: DX 16; Tr. 10-11).

[4] At the hearing, Claimant's attorney and the Employer's attorney withdrew several issues by striking out and initialing the issues withdrawn on Form CM-1025. I now admit that copy into evidence as ALJX 2. The issues listed here are those that remained to be decided.

[5] At the hearing, Claimant testified that his daughter was married about a year prior to the hearing and it was requested that he submit evidence of the date of his daughter's marriage in the event benefits are awarded, for purposes of determining augmentation of benefits. (Tr. 15-17).

Claimant has not worked anywhere since March of 2003. (DX 16; Tr. 20). Claimant alleged that he worked twenty-seven years in the mines and the parties stipulated that he had twenty-four years of qualifying coal mine employment. (ALJX 2.). All of his coal mine work took place in Kentucky.

Claimant testified that he feels like he is smothering if he is around any type of dust and cannot climb stairs without becoming extremely short of breath. (Tr. 15). He can only work about fifteen or twenty minutes around the house and yard. He also has had shoulder and knee injuries, along with his back injury, but Claimant testified that his breathing problem, alone, would prevent him from returning to mine work. (Tr. 14). He is still being treated with medication for his back. (Tr. 18-19). He does not take medication for any other health problems. (Tr. 2). He testified that Dr. Barbara French has been his family doctor for several years. (DX 16). At the hearing, Claimant testified that he smoked "years ago" at the rate of about a pack of cigarettes per day. (Tr. 12). In a previous questionnaire of record, however, Claimant wrote that he started smoking as a teenager and quit over ten years ago. (DX 16).

Length of Coal Mine Employment

Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. The parties stipulated and I find that, based on a review of Claimant's employment records, Claimant engaged in coal mine employment for twenty-four years.

Claimant's last coal mine work involved heavy lifting and heavy manual labor performing the duties of a beltman, timberman, and jack setter.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, not more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii).). §§ 725.414(a)(2)(ii); (a)(3)(ii); and (a)(3)(iii). Notwithstanding the limitations of § 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4).

Claimant selected Dr. Baker to provide his Department of Labor sponsored complete pulmonary examination. (DX 14). Dr. Baker conducted the examination on July 19, 2004. I

admit Dr. Baker's report under § 725.406(b). I also admit Dr. Barrett's quality-only interpretation of the chest x-ray under § 725.406(c). (DX 15).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 1). Claimant listed the examination by Dr. Glen Baker as initial evidence. Claimant listed as initial evidence the x-ray interpretation by Dr. Baker and Dr. Baker's pulmonary function study and blood gas study, all dated July 19, 2004. Claimant's evidence complies with the requisite quality standards of §§ 718.102 - 718.107 and the limitations of § 725.414(a)(3). Therefore, I admit the evidence Claimant designated in his summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 9). Employer listed the medical reports of Drs. David M. Rosenberg and Matthew Vuskovich as its initial evidence. Employer also listed as initial evidence x-ray interpretations by Drs. Rosenberg and Poulos of a film dated June 15, 2005. (EX 1; EX 6). Finally, the Employer lists the pulmonary function study and blood gas study ordered by Dr. Rosenberg. The Employer's evidence complies with the requisite quality standards of §§ 718.102 - 718.107 and the limitations of § 725.414(a)(3). Therefore, I admit the evidence Employer designated in its summary form.

X-RAY REPORTS

Exhibit	Date of X-ray	Date of Reading	Physician/Qualifications	Interpretation
DX 14	7/19/2004	7/19/2004	Baker-B-Reader[6]	1/0
DX 15	7/19/2004	8/09/2004	Barrett--B-Reader, BCR	Quality reading only--Quality 2
EX 1	6/15/2005	6/15/2005	Rosenberg/B-Reader	1/0
EX 6	6/15/2005	6/15/2005	Poulos/ B-Reader, BCR	1/0

[6] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. See Blackburn v. Director, OWCP, 2 B.L.R. 1-153 (1979). "BCR" designates a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. See 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

PULMONARY FUNCTION STUDIES

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 14 7/19/2004	Good/ Good/Yes	46/ 68.25"[7]	3.32	5.10	---	65%	No
EX 1&2 6/15/2005	Good/ Good/Yes	47/ 69"	3.88	4.56	84	85%	No

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 14	7/19/2004	39	89	No
EX 1&2	6/16/2005	7.43 7.41*	40 38.6	No

*post exercise

NARRATIVE MEDICAL EVIDENCE

Dr. Glen Baker examined Claimant on July 19, 2004. (DX 14). Based on the miner's medical history, coal mining history of working underground for twenty-four years, symptoms, x-ray, pulmonary function study, blood gas study, EKG, and an uncertain smoking history, Dr. Baker diagnosed category 1/0 coal workers' pneumoconiosis. Dr. Baker based this diagnosis on the x-ray interpretation and the patient's "history of coal dust exposure." He also found bronchitis, but ruled out chronic bronchitis, as they patient's symptoms were intermittent. In a supplemental letter, Dr. Baker clarified that he found "clinical" pneumoconiosis, as opposed to "legal" or "statutory" pneumoconiosis. He also found the pulmonary function and blood gas values were within normal limits. In his opinion, the miner's "mild bronchitis" could be due to his cigarette smoking habit "of an undetermined amount," but he estimated that the patient's smoking history was "probably greater than ten years." Dr. Baker concluded that the miner's twenty-four years of coal dust exposure "contributed significantly" to his pulmonary condition and "may be the primary cause of his bronchitis." In concluding, Dr. Baker wrote that "this condition has been significantly contributed to and aggravated by coal dust exposure." He found no pulmonary impairment, but listed a "Class I Disability," based on the Guides to the Evaluation of Permanent Impairment.

[7] As there is a discrepancy in the measured heights between the two pulmonary function studies, I must make a finding resolving that discrepancy. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). There is no measured height that represents a majority finding by the testers. Therefore, I shall average the heights. An average results in a height of 68.63 inches. Thus, I find Claimant's height to be 68.63 inches.

Dr. David M. Rosenberg, who is board-certified in pulmonary disease and a B-reader, examined Claimant on June 15, 2005. (EX 1). Dr. Rosenberg noted Claimant's symptoms of shortness of breath, coughing spells, occasional wheezing, no phlegm production, occasional difficulty sleeping at night, no chest pain, and occasional swelling of his legs. The doctor ordered an x-ray, CT scan of the chest, blood gas study, pulmonary function study and EKG. He also considered the miner's employment history of twenty-four to twenty-six years in mining ending in 2003 and considered a smoking history of two years, quitting about fifteen to twenty years ago. Based on this information, Dr. Rosenberg determined that Claimant had "micronodularity both on chest x-ray and HRCT of the chest compatible with simple CWP." He noted that the values from both the pulmonary function study and the blood gas study were normal. Therefore, his opinion was that "from a pulmonary perspective he could perform his previous coal mining job or similarly arduous types of labor." Dr. Rosenberg wrote that Claimant did not have COPD [chronic obstructive pulmonary disease]. Upon being deposed, this specialist repeated his written findings and added that Claimant's smoking history was not "significant." (EX 4). He emphasized that the miner was "clearly not disabled from a pulmonary or respiratory perspective" and that Claimant retained the respiratory capacity to return to his previous job in and around the mining industry or a job requiring similar manual labor. The doctor based this opinion on the objective tests showing no restriction or obstruction with normal gas exchange.

Dr. Matthew A. Vuskovich, board-certified in Occupational Medicine and Preventative Medicine and a B-reader, reviewed all medical evidence and test results of record up to the date of his report on July 2, 2006. (EX 5). Dr. Vuskovich also considered a coal mining history of twenty-six years, ending in 2003, and a smoking history of two years, last smoking around 1980. In this doctor's opinion, Claimant had developed "one occupational pulmonary disease, low-category simple coal workers' pneumoconiosis." He explained that his diagnosis was "clinical" pneumoconiosis based on the x-rays. However, Dr. Vuskovich did not believe Claimant had any pulmonary impairment, based on the valid objective test results. Therefore, this physician stated that pneumoconiosis was not the cause of any impairment. He also found no evidence of COPD. This doctor attached studies to his report concerning pulmonary function in coal miners and occupational dust exposure as it relates to COPD. These articles were authored by several pulmonologists who have studied the effects of coal dust on pulmonary function in miners.

DISCUSSION AND APPLICABLE LAW[8]

This claim was filed after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

[8] Because all of Claimant's qualifying coal mine employment took place in Kentucky, the law of the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP,*, 12 BLR 1-200, 1-202 (1989)(en banc).

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record contains four x-ray interpretations of two x-rays taken in 2004 and 2005. One of these readings, by Dr. Barrett, is a quality reading, only, of the July 19, 2004 x-ray. All of the readings are positive for the presence of pneumoconiosis, and all of the interpretations are by highly-qualified readers. Therefore, Claimant has established the existence of pneumoconiosis by this type of evidence under section (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidence does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

All of the examining and reviewing doctors agreed that Claimant has simple CWP, based on his x-rays and his CT scan of the chest. There is no conflict in the record regarding this opinion. Thus, Claimant has shown, by a preponderance of the evidence, that he suffers from pneumoconiosis under subsection (a)(4).

Claimant has established the presence of pneumoconiosis under §§ 718.202 (a)(1) and (a)(4). Because Claimant has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis. The employer has proffered no evidence to show another cause for Claimant's pneumoconiosis. Accordingly, I find that Claimant's pneumoconiosis arose

from coal mine employment. However, he must still show that he is totally disabled by this disease for entitlement to benefits.

Total Disability

Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant suffers from complicated pneumoconiosis or progressive massive fibrosis to consider. I find that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The two pulmonary function studies submitted with this claim did not produce qualifying values. Therefore, Claimant cannot establish total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies.[9] The three blood gas studies submitted with this claim did not produce qualifying values. Therefore, Claimant cannot establish total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is not any evidence of cor pulmonale with right-sided congestive heart failure to consider. Therefore, Claimant cannot establish total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Claimant's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment.

Dr. Baker found "no pulmonary impairment." Furthermore, in stating that Claimant had a Class I Disability based on the Guides to the Evaluation of Permanent Impairment, Dr. Baker was relying on standards for determining impairments that are not considered as the regulatory

[9] The resting and exercise studies conducted on June 15, 2005, are considered two separate tests for purposes of this Decision and Order.

standards to be used in black lung claims. Dr. Baker's description of the Claimant's impairment under the "Guides" he refers to is vague and equivocal in terms of being able to determine whether Claimant is disabled from returning to his former coal mine duties from a physical standpoint. Therefore, Dr. Baker's opinion does not weigh in favor of finding total disability by medical opinion evidence.

Dr. Rosenberg, a pulmonary specialist, unequivocally stated that Claimant was not totally disabled from a respiratory standpoint and that he retained the respiratory capacity to return to his former coal mine work. Dr. Vuskovich also believed that Claimant had no pulmonary impairment based on the objective test results. I find both of their opinions documented and well-reasoned and thus, entitled to significant probative weight. *See Scott v. Mason Coal Co.,* 14 BLR 1-37 (1990) (en banc recon.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

There are no conflicting reports of record on the issue of total disability due to a pulmonary impairment. As a result, I find that Claimant has not established total disability under subsection (b)(2)(iv).

Considering the non-qualifying pulmonary function and blood gas study evidence along with the medical evidence that is insufficient to establish total disability due to pneumoconiosis, I find that Claimant failed to establish that he is totally disabled under subsections (b)(i)-(iv). Therefore, after weighing all of the medical evidence concerning total disability under § 718.204(b), I find that Claimant has failed to establish that he is totally disabled due to pneumoconiosis.

Entitlement

The Claimant, L.C., has shown, by a preponderance of evidence, that he has pneumoconiosis, but has now proved that he is totally disabled due to pneumoconiosis. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that L.C.'s claim for benefits is DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).